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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 162.

UNITED STATES, *ex rel.*, ASPASIA POLYMERIS and ANTIGONE POLYMERIS,

Petitioners,

v.

JOSEPH W. TRUDELL, Immigration Inspector in Charge.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

HAROLD VAN RIPER,
Attorney for Petitioners.

THE BALLOU PRESS NEW YORK

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PETITION FOR REHEARING.

Petitioners, by their counsel, Harold Van Riper, respectfully ask for a re-hearing in the above entitled matter to the end that if the judgment of the court below be not reversed, that, at least, the decision of this Honorable Court be modified or amplified to the extent of indicating a remedy for the condition with which petitioners are now confronted.

The grounds for this petition are as follows:

FIRST: The decision already has been cited by an Assistant United States Attorney, Southern District of New York, after conference with the other assistants in the civil de-

partment, as holding that even alien residents who go to Canada and return within a few days are barred from re-entry unless possessed of re-entry permits or non-quota immigration visas, notwithstanding they are specifically exempted from such necessity by paragraph 1, Sub-Division F, Rule 3, "Immigration Laws and Rules, January 1, 1930," printed as part of the appendix at page 38 of respondent's brief herein. It, therefore, would seem that the holding "A returning alien cannot enter unless he has either an immigration visa or a return permit" is so general as to permit of misconstruction.

SECOND: In the light of the facts and circumstances peculiar to the case, the decision also might be misconstrued as holding that Section 2 (f) of the act of 1924 (8 U. S. C. 202-f) divests the Secretary of Labor of the power to determine the admissibility of aliens which he for many years exercised under Sections 16 and 17 of the Act of 1917 (8 U. S. C. 152-153) and corresponding sections of prior acts, and places such power solely in American consular officers abroad without a right of review by either the Secretary of State, the Secretary of Labor or the Courts. Such a construction, if proper, would mean that consular officers are the only government officers, from the President down, whose action on behalf of the government, if illegal, cannot be reviewed by a court of competent jurisdiction. In other words, that the consular voice is the only one authorized to express the will of the United States in matters of this kind.

THIRD: Petitioners, like thousands of other lawfully domiciled alien residents of the United States, were temporarily absent from the United States on May 26, 1924, the date of approval, and on July 1st, 1924, the effective date, of the Immigration Act of 1924, and, therefore, could not have secured re-entry permits, inasmuch as Sec. 10(a) of said Act (8 U. S. C. 210-a) provides for their issuance by the Commissioner General of Immigration *only* to aliens

"about to depart temporarily from the United States". For the same reason petitioners cannot now secure re-entry permits, because, in the eyes of the law, they are standing outside the United States at the Border Port of St. Albans, Vermont, seeking entrance into the United States (our italics).

FOURTH: Notwithstanding this Honorable Court, the two Courts below and the Secretary of Labor hold that petitioners are "aliens previously lawfully admitted to the United States who are returning from a temporary visit abroad", nevertheless the Secretary holds that he has no power to readmit them to the United States unless they become possessed of a re-entry permit, which, for the reasons above given, he has not the power to issue to them, or a non-quota immigration visa to be secured from an American Consul abroad. The Secretary's holding that "the aliens have no immigration visaes nor permits and are, therefore, prohibited from entry" is to be found at page 31 of the original petition and brief herein. If this Honorable Court believes that it is still within the discretionary power of the Secretary of Labor, under Section 13-b of the 1924 Act, to readmit petitioners, and other alien residents similarly situated, without re-entry permits or non-quota immigration visas, it would be helpful in the instant case and prevent a multiplicity of future litigation if it saw fit so to indicate.

FIFTH: The Secretary of State holds that he has no power to instruct consular officers in the matter of the issuance of visaes. (Last paragraph letter Aug. 3, 1929, R. 65.) If this Honorable Court believes that in view of Sec. 202, R. S. (5 U. S. C. 156) and Sec. 24 of the Act of 1924 (8 U. S. C. 222) the Secretary of State has the power to instruct consular officers in matters relating to visas, an indication to that effect likewise would be helpful for the same reasons as those given above.

SIXTH: As matters now stand, unless some American Consul sees fit to issue non-quota immigration visas to this sixty-seven-year-old mother, and this thirty-one-year-old sister, of two reputable American citizens of substance, the only relatives whom they have in the world, it is extremely doubtful as to whether or not this little family ever will be reunited, the Greek quota being so small as almost to preclude the possibility of their receiving quota visas during the courses of their natural lives.

SEVENTH: At the time of argument of this matter on December 9, 1931, and in their briefs, petitioners discussed solely the question of the authority of the Secretary of Labor to deny them admission, even though not possessed of re-entry permits or non-quota immigration visas, believing it to be the only relevant and material issue involved. However, respondent devoted only five pages of his brief to said question, and in the remaining nineteen pages of his brief, and in his argument, discussed almost nothing but the question of the consul's right to refuse to issue a visa, a question which, as stated above, petitioners did not believe to be relevant or material. In the course of argument respondent advanced the dangerous theory that consular officers cannot be reached by our Courts, and the Honorable Justices asked questions as to the extent of the consular authority, as to whether or not the Secretary of Labor had the right without cause to refuse admission to returning alien residents of the United States even if possessed of re-entry permits or non-quota visas, and, particularly, as to whether or not there was any legislative history of the matter. Both parties tried to answer the firts two questions but neither party at the time was able to answer the last question. There is a legislative history of the matter and petitioners feel that it, together with their answer to the question as to the extent of the consular authority to refuse to issue visas, should be considered.

Legislative History.

While the Immigration Act of 1924 was still pending before the House, Chief Justice Hughes, then Secretary of State, evidently perceived the danger of just such an occurrence as has transpired in the case at bar. Under date of February 8, 1924 he wrote to Chairman Johnson of the House Immigration Committee (Cong. Rec. Apr. 4, 1924, p. 5585) in part as follows:

> "I fully appreciate the importance of removing present hardships by the issue of immigration certificates to those who would normally come under immigration laws. I indorse this policy. Assuming that treaties were not violated and immigration certificates were demanded of those who normally would be classed as immigrants, I should not object to the giving of authority to consular officers to issue immigration certificates, provided, of course, that consular officers were properly equipped with the requisite staff to carry out the provisions of the law. It seems to me that the granting of such immigration certificates might be treated as so analogous to the granting of vises as properly to come within a broad description of consular functions. In the absence of the violation of any treaty, I assume that the admission of immigrants to this country could be conditioned upon their receiving an immigration certificate in the manner required by our laws; although, of course, if independent machinery through special immigration officials were sought to be set up in foreign countries such officials would have to be properly accredited to the foreign governments and could not function without the consent of the foreign State in whose territory they would act."

and supplemented same in his letter of February 19, 1924 (Cong. Rec. Apr. 4, 1924, p. 5587) by saying:

> "Section 2(f) of the Johnson bill reads as follows:
>
> 'No immigration certificate shall be issued to an immigrant if facts are stated in his application, or in the papers submitted therewith, from which it appears that he is inadmissible to the United States under the

immigration laws, nor shall such certificate be issued if the application fails to comply with the provisions of this act. * * *"

The bill does not seem to give consular officers authority to make any examination of prospective immigrants beyond requiring them to answer the questions in the application and to submit dossiers and prison and military records. Thus if the applicant states that he does not come within any one of the classes subject to exclusion under the immigration law and the dossier and records submitted by him fail to show that he does, it would seem that the consul has no authority under the proposed law to refuse to grant an immigration certificate, even though he knows, or has reason to believe, that the applicant is in fact subject to exclusion. Whether or not it is desirable or feasible for consular officers to apply the immigration tests, a question which I am not undertaking to answer at present, it seems to me that it would be very unfortunate to pass a law generally understood to accomplish something which, as a matter of fact, it does not accomplish. If it is the sense of Congress that there should be a thorough examination of prospective immigrants in the consulates, to ascertain, as far as possible, whether they are subject to exclusion under the immigration law, and that the consuls should have authority to refuse immigration certificates to those who appear to be subject to exclusion, I shall, of course, be glad to cooperate with the committees of Congress for the purpose of formulating the necessary amendments to the bill.

While I see no objection, under international law, to making such a change in the immigration system, it is important to bear in mind that it would add considerably to the work of the consulates and require a proportionate appropriation to carry it out thoroughly and effectively.

I may add that, although it may be deemed undesirable to authorize consuls to examine prospective immigrants with regard to all of the exclusion provisions of the immigration law, in addition to requiring them to fill out the application and submit dossiers and other records specified in the bill, it might still be desirable to authorize a special examination as to certain specified provisions. It is for Congress to decide to what extent,

if at all, consuls are to participate in the enforcement of the immigration law. It is deemed important to have the authority and duty of consuls in this matter prescribed as definitely as possible. * * *"

As a result of all of the foregoing the pending bill, as revised, was reintroduced as H. R. No. 7995 with an accompanying report numbered 350, dated March 24, 1924, in which report at page 10 the following appears:

"This bill defines immigrants and provides that their applications for visa to passports shall be in the form of questionnaires, from which the consuls of the United States shall pass upon the admissibility of the applicants as immigrants. The consuls are given power to reject *for cause*. * * *" (Our italics.)

This question was the subject of discussion in Committee and in the House, and the two letters above mentioned were introduced by Congressman Sabath on April 4, 1924, who, in the course of his remarks (Cong. Rec. Apr. 4, 1924, p. 5584) said:

"The provision contained on lines 11, 12, 13 and 14 of page 2, which calls for information to be given by the intending immigrant, in addition to that specifically enumerated, which the Secretary of Labor shall by regulation prescribe as necessary to the proper enforcement of the immigration laws and the naturalization laws. That is, a provisions so broad as to enable the Secretary to call for an examination such as is required at the port of arrival and which might be interpreted as permitting the consular officer to deny to the immigrant the certificate upon which the right to land depends. I am opposed to conferring such authority upon the consular officers, who would thereby be enabled to prevent immigration arbitrarily, since this absolute power is not subject to a right of review. This would confer tremendous power upon subordinate officials thousands of miles from the seat of government and practically free from effective supervision, upon men who have no special qualifications or experience fitting them for the discharge of such difficult duties and, being only human,

> are bound to have their prejudices. In the past some of our ablest statesmen have strenuously objected to the delegation of such unusual authority to a handful of bureaucrats, practically free from all restraint, who are likely to degenerate into so many little czars."

As a result of all of the foregoing and of investigation prosecuted in foreign countries, it was determined that the setting up of Boards of Special Inquiry and other immigration bodies in foreign countries was impracticable, and the act as finally passed, after conference by both houses, contained Section 2(f) (8 U. S. C. 202-f) reading as follows:

> "(f) No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails to comply with the provisions of this act, nor shall such immigration visa be issued if the consular officer *knows* or *has reason* to believe that the immigrant is *inadmissible* to the United States under the immigration laws." (Our italics.)

from which it clearly appears that Congress did not give consular officers any authority other than to require aliens to make out prima facie cases in their application, and, if they so desire, to investigate same. In the case at bar a prima facie case would consist of proof that petitioners had previously been lawfully admitted to the United States, that they had been temporarily absent therefrom without relinquishment of their domiciles therein, and that they were not unconditionally *inadmissible,* as distinguished from merely being subject to exclusion for some reason or reasons specified in Section 3 of the Act of 1917 (8 U. S. C. 136) which the Secretary of Labor could waive by reason of the discretionary power vested in him by the 7th Proviso of said Section 3.

Paragraphs 117 to 123, inclusive, of the Secretary of State's General Instruction Consular No. 926, issued by him in collaboration with the Secretary of Labor in accordance

with Section 24 of the Act of 1924 (8 U. S. C. 222) printed at page 40 of respondent's brief herein, indicate that both executive departments apparently are in accord on the proposition that it is the Consul's duty to issue a non-quota immigration visa if the returning alien resident makes out a prima facie case, as petitioners did in the instant case. A specific ruling on this question likewise would be very helpful.

The question of the finality of consular action and certificates was the subject of review in a case wherein the customs authorities contended that where a consul had issued a certificate as to the extent of the depreciation of the currency of a foreign country, and annexed to a consular invoice, a document without which the importer could not enter his goods at the customs port of entry in the United States, the importer was estopped from questioning such certificate and showing the true, lower value of the currency for the purpose of levying the customs duties thereupon. Such case, *De Forest* v. *Redfield*, 4 Blatch. 478, United States Circuit Court, Southern District of New York, December 29, 1860, page 464, says:

> "The law makes it necessary, that the importer should procure the certificate of the United States consul of commercial agent at the foreign port from which the goods are shipped, not only as to the value of the foreign currency in which the invoice is made out, but as to the value of the goods in such port, and without it they cannot be entered at the Custom-House at all; but it has never been considered that such certificate was more than *prima facie* evidence, either as to the value of the currency or of the merchandise. *It would be singular, indeed, if the certificate of such inferior officers of the Government in relation to question of fact could be held to conclude the party against whom they were presented from showing the truth.*" (Italics ours.)

The decision herein holds in part as follows:

> "The relators have no right to enter the United States unless it has been given to them by the United States.

The burden of proof is upon them to show that they have the right. Immigration Act of 1924, Sec. 23, 43 Stat. 165; Code, Tit. 8, Sec. 221."

This Honorable Court in its preamble, both Courts below, and the Secretary of Labor, held unequivocally, that petitioners were and are immigrants previously lawfully admitted to the United States who were returning from a temporary visit abroad, wherefore they were and are exempt from the numerical quota restrictions of the 1924 Act by reason of the express provisions of Section 4 (b) thereof (8 U. S. C. 204-b), and, therefore, entitled to receive non-quota immigration visas under Section 8 of said Act (8 U. S. C. 208).

Section 25 of the 1924 Act (8 U. S. C. 223) provides:

> "SEC. 25. The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this act. An alien, although admissible under the provisions of this act, shall not be admitted to the United States, if he is excluded by any provision of the immigration laws other than this act, and an alien, although admissible under the provisions of the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of this act." (Our italics.)

The term "Immigration Laws", insofar as applicable to the case at bar, means the basic Immigration Act of February 5, 1917. Therefore, we must examine the provisions of Section 3 of that Act (8 U. S. C. 136) under which the Secretary of Labor derives whatever authority he may possess, other than that given him by Section 13 (a) of the 1924 Act, to exclude aliens from entry into the United States, and an examination thereof shows that petitioners were laboring under none of the disabilities specified therein. Further, an examination of the Secretary of Labor's decision herein (appended to orig-

inal petition for writ of certiorari as pages 28 to 34), shows that he based his order of exclusion on none of said grounds. A further examination of said Section 3 will show that the 7th Proviso thereof permits the Secretary of Labor, in his discretion, to readmit aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years, as were petitioners, even though they may fall within some of the classes therein specified as excludable. Therefore, it is manifest that Congress intended that returning alien residents should be permitted to re-enter unless their presence here would be dangerous to the well-being of the United States.

Another question which has not been considered is the status of aliens after lawful admission into the United States for permanent residence therein. After admission they have the right to acquire and hold real and personal property, to pursue happiness and to do every single thing that a citizen can do except to vote. They have the same rights under the Constitution and the laws, and in the Courts, such rights cannot be wrested from them except by due process of law, and Congress has very carefully safeguarded such rights by the enactment of Section 19 of the 1917 Act (8 U. S. C. 155), an examination of which will show that if an alien's original entry be lawful, the Secretary of Labor cannot terminate his residence in the United States, and deport him therefrom, unless it be shown that after entry he has advocated anarchy or has become a public charge, a criminal, a prostitute or procurer, or a dealer in narcotics.

Does it then seem possible that, in an act intended solely to limit the number of immigrants who may enter the United States under the 1917 Act, Congress intended that alien residents should be stripped of the valuable right of residence so carefully safeguarded under the 1917 Act merely because at the time of their attempted re-entry after a temporary absence they did not possess one of two pieces of paper; the one a re-entry permit, which they never could and cannot now obtain,—because legally abroad now and when the act

was approved; and the other a non-quota immigration visa which a consular officer arbitrarily refused, and probably will containue to refuse to issue to them.

Legislative History of Re-entry Permits.

Prior to May 26, 1924, the date of enactment of the Immigration Act of 1924 which became effective July 1, 1924, re-entry permits were unknown to our statutes.

House Report No. 350, dated March 24, 1924, to accompany H. R. No. 7995, at page 18 contains the following:

> "Provision is made for issuance by the Commissioner General of Immigration of permits to aliens permanently domiciled in the United States who desire to go abroad and return after temporary absence. The permit to re-enter may be issued upon application by the alien with payment fee of $6; it will be valid for six months with privilege of renewal; will identify the alien; but there will be no obligation upon the alien to obtain or carry it. It will be of value only as evidence that the alien to whom it is issued is returning from a temporary visit abroad. *This provision is made solely for the convenience of the alien.*" (Our italics.)

and sub-section (f) of Section 10 of the Law as finally enacted (8 U. S. C. 210-f) reads as follows:

> "(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit *the exclusive means* of establishing that the alien is so returning." (Our italics.)

thus carrying out the Congressional intent as expressed in said Report No. 350.

Legislative History of Sub-section (B) of Section 13 of 1924 Act.

Section 13 (b) prior to submission to the Conference Committee and final enactment was carried as Section 10 (b), reading as follows:

> "Sec. 10 (b): An alien who has been legally admitted to the United States and who departs therefrom temporarily at frequent intervals may be admitted to the United States, under such conditions as may be by regulations prescribed, without being required to obtain a visa certificate in respect of each entry into the United States."

and, as finally enacted (8 U. S. C. 213-b), reads:

> "(b) in such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa."

from which it clearly appears that Congress intended to relieve bonafide alien residents of undergoing all of the formalities applicable to immigrants coming here for the first time, and that regulations should be made merely for the determination of their true status as such. Certainly, an examination of Section 10 (f), above quoted, will show that Congress expressly provided that the regulations should not make the re-entry permit the sole means of establishing previous lawful admission and continuous residence, as do the present regulations quoted on pages 38 and 39 of respondent's brief herein, which was the holding in *Johnson* vs. *Keating*, 17 f. (2d) 50, at page 52.

If these two ladies had merely stepped out of their home without their key and the door locked after them, a good American neighbor first would try his own keys, and, if they failed to open the door, he would then put his shoulder to it

and force it open. The facts in the case at bar are comparable to such a situation.

All of which is respectfully submitted.

HAROLD VAN RIPER,
Attorney for Petitioners,
1 Broadway,
New York.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HAROLD VAN RIPER, being first duly sworn, deposes and says, that he is a member of the bar of the Supreme Court of the United States and is attorney for the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that said petition is meritorious, and that it is presented in good faith and not for delay.

HAROLD VAN RIPER.

Subscribed and sworn to before me
this 27th day of January, 1932.

DAVID RUSS,
Notary Public, Bronx County.
Certificate filed in N. Y. County.

SUPREME COURT OF THE UNITED STATES.

No. 162.—October Term, 1931.

United States of America *ex rel.* Aspasia Polymeris and Antigone Polymeris, Petitioners,
vs.
Joseph W. Trudell, Immigration Inspector in Charge.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 4, 1932.]

Mr. Justice Holmes delivered the opinion of the Court.

The relators, Aspasia Polymeris and her daughter Antigone, are Greek citizens who lawfully entered the United States in 1909 and lived for a number of years in New York City, which became and remains their domicil. In 1923 on account of the illness of Aspasia's husband they went back to Greece with the intention, which the Courts below found that they retained, of making only a temporary visit. The death of the husband and the necessity of settling his estate prolonged their stay until 1924. Beginning in that year they made several unsuccessful applications to the United States Consul General at Athens for documents that would permit them to return to New York. Finally, in 1929, they got authority to cross Canada on a pretended trip from Greece to Japan and in 1930 presented themselves at St. Albans, Vermont, for admission to the United States. They were taken into custody by the immigration inspector and sought release by habeas corpus, on the ground that they were entitled to enter the country. It was held that they "were properly excluded under Section 13 (a) of the Immigration Act of May 26, 1924, 42 Stat. 153, 161, since the Secretary of Labor did not admit them in his discretion, . . . and neither presented an unexpired valid immigration visa or an unexpired valid permit to reenter in accordance with the regulations promulgated under § 13 (b) of that Act." 49 F. (2d) 730. A contrary decision was reached in *Johnson* v. *Keating*, 17 F. (2d) 50. Therefore a writ of certiorari was granted by this Court.

The relators have no right to enter the United States unless it has been given to them by the United States. The burden of proof is upon them to show that they have the right. Immigration Act of 1924, § 23, 43 Stat. 165; Code, Tit. 8, § 221. By § 13, and the regulations under it, as remarked by the Court below, a returning alien cannot enter unless he has either an immigration visa or a return permit. The relators must show not only that they ought to be admitted but that the United States by the only voice authorized to express its will has said so. Obviously it has not done so and therefore the judgment must be affirmed.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.